STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA GAY, personal representative of the ESTATE OF DOLORES M. WRIGHT, deceased,

Plaintiff-Appellant,

v

SELECT SPECIALTY HOSPITAL,

Defendant-Appellee,

and

BATTLE CREEK HEALTH SYSTEM,

Defendant.

FOR PUBLICATION
January 31, 2012
9:00 a.m.

No. 301064
Calhoun Circuit Court
LC No. 2008-003757-NH

Advance Sheets Version

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

M. J. KELLY, P.J.

In this nursing malpractice case, Patricia Gay, as personal representative of the estate of Dolores M. Wright, deceased, appeals by right the trial court's order dismissing Gay's suit against defendant Select Specialty Hospital.[1] On appeal, the primary issue is whether the trial court erred when it determined that Gay's proposed nursing expert, Kathleen Boggs, R.N., did not meet the qualifications required of experts who propose to testify concerning the applicable standard of care. See MCL 600.2169(1). We conclude that the trial court erred when it determined that Boggs did not meet the qualifications stated under MCL 600.2169(1). Because Boggs was qualified to testify about the standard of care, the trial court further erred when it dismissed Gay's claim on the ground that Gay did not have an expert to establish the standard of care for her malpractice claim. Accordingly, we reverse and remand for further proceedings.

[1] The trial court issued an order dismissing Gay's claims against defendant Battle Creek Health System in April 2009. That order is not at issue on appeal.

I. BASIC FACTS AND PROCEDURAL HISTORY

Dolores Wright was admitted to Select Specialty Hospital to treat her rheumatoid arthritis—including associated rheumatoid lung disease—in October 2003. Wright responded well to the treatments and, on Thursday, November 13, 2003, Wright learned that she would be discharged from the hospital on the following Monday. However, the next day a nurse assisted Wright to a commode, but left her unattended. When her phone rang, Wright reached for it and fell from the commode. She injured her head, fractured her shoulder, and died two days later.

In November 2008, Patricia Gay, acting as the personal representative of Dolores Wright's estate, sued the hospital. In the complaint, Gay alleged that, in order to comply with the standard of care applicable to Wright's conditions, the hospital's nursing staff had to remain by Wright's side and assist her whenever she was out of bed. As such, the nurse should not have left Wright unattended on the commode and had the nurse not done so, she could have prevented Wright's fall. Gay alleged that the fall was a direct and proximate result of the hospital's nursing staff's negligence and that the fall ultimately led to Wright's death. Gay submitted Boggs' affidavit of merit in support of the complaint. In the affidavit, Boggs averred that the nursing staff should have assessed Wright for fall-risk on each shift and, given Wright's frailty, should not have left her unattended while she used the commode.

The hospital alleged that its nursing staff was not negligent. Rather, Wright's condition had improved significantly and immediately before Wright reached for the phone, a nurse had come in and instructed her to wait for assistance.

Approximately two years later, in September 2010, the hospital moved to strike Boggs as an expert and dismiss Gay's complaint with prejudice. The hospital argued that the affidavit of merit was insufficient because Boggs was not qualified to testify as an expert. More specifically, the hospital argued that Boggs did not devote a majority of her professional time to the active clinical practice of nursing or to the instruction of nursing students in an accredited health professional school or accredited residency or clinical research program in the year immediately preceding the fall. As such, the hospital argued that Boggs was not qualified to sign the affidavit of merit under MCL 600.2169(1)(b) and that the trial court had to dismiss the case.

After hearing oral arguments on the motions, the trial court determined that Boggs did not meet the expert qualifications stated under MCL 600.2169(1)(b). Accordingly, the trial court granted the hospital's motion to strike Boggs as an expert witness. The trial court also determined that Gay did not timely propose an alternate expert witness. Therefore, it granted the hospital's motion to strike Gay's supplemental witness list. The trial court then dismissed the case with prejudice. Gay now appeals.

II. STANDARDS OF REVIEW

"Ordinarily, the qualification of competency of expert witnesses is a matter for the discretion of the trial judge . . . ." *Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976). By reviewing a trial court's decision concerning the admission of expert testimony under this highly deferential standard, appellate courts recognize that the trial court's assessment of the proposed expert and his or her testimony typically involves a complex balancing of various

factors. See, e.g., *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 592-595; 113 S Ct 2786; 125 L Ed 2d 469 (1993) (noting that, in reviewing the admission of expert testimony, trial courts must consider a variety of factors—including being mindful of other applicable rules—to determine the evidentiary relevance and reliability of the proposed testimony). The same is true when examining a witness's qualifications; the court must weigh the witness's "knowledge, skill, experience, training, [and] education" and determine whether—on the basis of those factors—the witness is sufficiently qualified to offer expert testimony on the area at issue. MRE 702. There is always the concern that jurors will disregard their own common sense and give inordinate or dispositive weight to an expert's testimony. See *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995) (noting the potential that a jury might defer to an expert's seemingly objective view of the evidence). For that reason, trial courts must—at every stage of the litigation—serve as the gatekeepers who ensure that the expert and his or her proposed testimony meet the threshold requirements. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). This includes determining whether the witness's expertise fits the nature of the witness's proposed testimony. *Id.* at 789.

Although trial courts have considerable discretion in determining whether a witness is qualified to testify as an expert, see *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986), trial courts must nevertheless accurately apply the law in exercising their discretion. See *Gilbert*, 470 Mich at 780 ("While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'"), quoting *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 158-159; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (Scalia, J., concurring); see also *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (noting that a trial court necessarily abuses its discretion when it premises its decision on a misapplication of law). They may not, for example, apply an "overly narrow test of qualifications" in order to preclude a witness from testifying as an expert. *Whitfield*, 425 Mich at 123. And, this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the law. See *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). Moreover, when a trial court admits or excludes evidence on the basis of an erroneous interpretation or application of law, it *necessarily* abuses its discretion. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009); *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405; 110 S Ct 2447; 110 L Ed 2d 359 (1990) (stating that a trial court necessarily abuses its discretion when it premises its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

III. EXPERTS AND THE APPLICABLE STANDARD OF CARE

In order to establish the malpractice claim at trial, Gay had to present evidence concerning the standard of care applicable to the nursing staff involved in Wright's care. See *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). And she could do so only through an expert's testimony. See *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). A witness must meet certain basic qualifications in order to testify as an expert. See, e.g., MRE 702. In addition, our Legislature has determined that a "person shall not give expert testimony on the appropriate standard of practice or care" in an action alleging medical malpractice unless that person meets certain requirements. One requirement is that the person must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority

of his or her professional time" to either the "active clinical practice" or the instruction of "students in an accredited health professional school or accredited residency or clinical research program" or both, where the active clinical practice or instruction is "in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ." MCL 600.2169(1)(b)(*i*) and (*ii*). Finally, the party proposing to call an expert bears the burden to show that his or her expert meets these qualifications. See *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067-1068 (2007).

Here, Gay retained Boggs to offer an expert opinion about the applicable standard of care. However, after the hospital deposed Boggs, it moved to strike her as a witness and dismiss Gay's case. The hospital argued that Boggs could not testify about the applicable standard of care because she did not meet the professional-time requirement stated under MCL 600.2169(1)(b). Specifically, the hospital presented Boggs's deposition testimony in which it claimed she admitted that she spent the majority of her professional time serving as an administrator. Moreover, because the time limit for adding witnesses had passed, the hospital argued that Gay should be precluded from adding an expert to testify regarding the applicable standard. Finally, the hospital maintained that the trial court had to dismiss Gay's suit because Gay would not be able to establish this element of her claim.

The trial court heard arguments on the hospital's motion and determined that Gay had not met her burden to show that Boggs met the professional-time requirement:

> Ah, here's the thing: I've reviewed your briefs, and I am not, ah, convinced that this witness meets the threshold requirements . . . to offer standard of care testimony. That's based on what's presented to me . . . including her affidavit. . . . The statute's clear . . . and she simply doesn't meet the requirements.
>
> As indicated, I don't think there's any argument that she [was] not actively in a clinical practice during the relevant time period, the year prior to the occurrence, and based on what's presented to me here, she was not an instructor of students in an accredited professional school during that period of time, either.

For that reason, the trial court granted the hospital's motion to strike Boggs as a witness. It also determined that Gay should not be permitted to add an expert witness and, because Gay would not be able to establish the applicable standard of care at trial, it also concluded that it must dismiss the case.

The evidence concerning Boggs's qualifications was undisputed. As such, whether Boggs met the requirements stated under MCL 600.2169(1)(b) was—and remains—a matter of applying the undisputed facts to the proper interpretation of that statute. Accordingly, if Boggs met the qualifications stated under MCL 600.2169(1)(b) as a matter of law, then the trial court necessarily abused its discretion when it struck her as a witness on the ground that she did not meet those requirements. *Kidder*, 284 Mich App at 170.

The trial court determined that Boggs did not spend *any* portion of her professional time in either the active clinical practice of nursing or in the instruction of nurses at an accredited

health professional school or accredited residency or clinical research program. Further, the trial court made this determination despite the fact that there was plain—and unrebutted—evidence that Boggs engaged in both the active clinical practice of nursing and instructed nurses at an accredited residency or clinical research program.

A. ACTIVE CLINICAL PRACTICE

During the relevant period, Boggs served as the director of education at a hospital. Boggs testified at her deposition that she oversaw education for all support staff, which included the nursing staff. She specifically denied that her job was a "desk job" even though there "was a lot of desk [time]." She explained: "I did all the orientation, I did all the CPR classes, I did continuing education, sat on a lot of committees, oriented nurses, new nurses to their units." Further, when asked whether she took an "active role in patient care" she stated that she did, but only "as far as I was working with the new nurses on their nursing unit." She said that her work in orienting the nurses involved 25 percent of her professional time.

Despite this testimony, the trial court determined that Boggs did not spend *any* time in the active clinical practice of nursing. The trial court apparently disregarded this aspect of Boggs's professional work because Boggs supervised the orientation of nurses and was not directly involved in the care of patients. But the Legislature did not impose any such requirement. Rather, the Legislature provided that a witness might testify as an expert if he or she spent the majority of his or her time in an "active clinical practice . . . ." Because the Legislature did not choose to define the phrase "active clinical practice," this phrase must be given its ordinary meaning. See *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325; 725 NW2d 80 (2006), citing MCL 8.3a.

The ordinary meaning of "clinical practice" is the practice of one's profession in a clinical setting. See *Random House Webster's College Dictionary* (2d ed, 1997) (defining "clinical" to mean "pertaining to a clinic" or "concerned with or based on actual observation and treatment of disease in patients rather than experimentation or theory" and defining "practice" to mean "to pursue a profession, [especially] law or medicine"). Thus, in the case of a medical professional, in order to be engaged in an active clinical practice, the professional's practice must involve practice in a clinical setting, which usually means a setting where patients are treated. But this is not the equivalent of stating that the professional must directly interact with patients, which is what the trial court apparently understood when it disregarded Boggs's work overseeing the orientation of new nurses for the hospital. A medical professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients. And the fact that many—if not most—nurses will physically interact with patients in the practice of their professions does not mean that a nurse who is indirectly involved in the care of patients is not engaged in the "active clinical practice" of nursing. Giving the phrase "active clinical practice" its ordinary meaning, the key question is whether Boggs was actively engaged in the profession of nursing in a clinical setting.

We also cannot agree with the dissent's conclusion that the word "active"—as used in the phrase "active clinical practice"—must be understood to impose a requirement that a nurse directly treat patients in order to be engaged in the "active clinical practice" of nursing. Although it has the sense of being "marked by or disposed to direct involvement or practical

action," the adjective "active" can also mean "engaged in action or activity," or "characterized by current activity, participation, or use." *Random House Webster's College Dictionary* (2d ed, 1997). In imposing professional-time requirements on expert witnesses, the Legislature intended to address a perceived problem with full-time professional witnesses who would ostensibly testify to whatever someone paid them to testify about. See *McDougall v Schanz*, 461 Mich 15, 25 n 9; 597 NW2d 148 (1999). And, in context, it is plain that the Legislature used the word "active" to ensure that the professional's practice involved actual, day-to-day, performance in a clinical setting. Accordingly, a professional who is semiretired, but who retains privileges in a clinical setting, might be said to no longer have an "active" clinical practice. Similarly, a professional who has a "clinical practice," but who leaves the day-to-day operation of the practice to partners or is otherwise uninvolved with the day-to-day practice is also not involved in an "active clinical practice." But the word "active" cannot be construed in this context to require that the professional physically interact with patients. Rather, the word "active" must be understood to mean that, as part of his or her normal professional practice at the relevant time, the professional was involved—directly or indirectly—in the care of patients in a clinical setting.

Here, Boggs testified that she spent one-quarter of her professional time orienting nurses to their units. Although the hospital did not ask Boggs to elaborate on what her orientation activities included, the act of orienting nurses within a hospital involves some degree of explaining, coordinating, and instructing nurses regarding the proper care of their patients. And explaining, coordinating and instructing nurses about the proper care of patients in a clinical setting necessarily involves—albeit indirectly—the treatment of patients. [2] Accordingly, it was undisputed that Boggs spent 25 percent of her professional time at the time of the occurrence at issue engaged in the "active clinical practice" of nursing. See MCL 600.2169(1)(b).[3]

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[2] On this point we must disagree with the dissent: a nurse who supervises other nurses in a hospital *is* practicing nursing in a clinical setting even though he or she does not directly treat specific patients. Indeed, if the supervising nurse were negligent in the supervision or training of his or her staff and that negligence led to an injury, he or she might be liable for malpractice even though he or she never physically touched the patient. It therefore seems inapposite to state that the supervision and training of nurses at a hospital does not amount to the active clinical practice of nursing.

[3] If only the time spent administering to patients counted towards the professional-time requirements stated under MCL 600.2169(1)(b), one would be forced to consider whether any nurse could meet the requirements. Presumably, every nurse must take lunch and bathroom breaks, fill out paperwork, attend staff meetings, and otherwise participate in a variety of activities that do not involve directly administering to patients. Nevertheless, these activities are an integral part of working in a clinical setting.

Even if one were to disregard the ordinary understanding of the phrase "active clinical practice," Boggs unequivocally testified that she took an active role in the care of patients while orienting nurses. Thus, even under a narrow understanding of the phrase "active clinical practice," Boggs spent some portion of this 25 percent of her professional time in active clinical practice. Moreover, common sense dictates that some portion of this percentage involved educating the nurses about their duties and the appropriate care of patients. Because Boggs averred that the hospital was accredited,[4] these educational activities should also be counted toward the professional-time requirements required under MCL 600.2169(1)(b). It is, therefore, evident that the trial court erred when it determined that Boggs did not spend *any* amount of her professional time engaged in the "active clinical practice" of nursing.

Boggs's work in orienting nurses at the hospital amounted to the active clinical practice of nursing within the meaning of MCL 600.2169(1)(b). Hence, the trial court's determination that Boggs' professional work did not involve any amount of active clinical practice must have been premised on an erroneous interpretation of MCL 600.2169(1)(b). Therefore, it abused its discretion when it struck Boggs under this erroneous understanding. *Kidder*, 284 Mich App at 170.

B. THE INSTRUCTION OF STUDENTS

Similarly, the trial court erred when it determined that Boggs did not spend any of her professional time engaged in qualified instruction. A witness may be qualified to testify as an expert on the standard of care if he or she instructs "students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ." MCL 600.2169(1)(b)(*ii*). Here, Boggs testified that she spent 50 percent of her professional time teaching at the hospital, which teaching—as already noted—she averred was for an accredited residency program. This, when coupled with her time engaged in the active clinical practice of nursing, clearly constitutes more than 50 percent of her professional-time and, therefore, meets the professional-time requirement stated under MCL 600.2169(1)(b). See *Kiefer v Markley*, 283 Mich App 555, 558-559; 769 NW2d 271 (2009).

Further, although Boggs later averred that she spent some portion of her time involved in administrative activities, we do not agree with the trial court's apparent conclusion that the time spent on administrative activities did not qualify as time devoted to the "instruction of students . . . ." The Legislature provided that the professional must have "devoted . . . his or her professional time" to the "instruction of students . . . ." MCL 600.2169(1)(b)(*ii*). The

[4] The hospital claims on appeal that Boggs did not actually teach in an accredited nursing residency or clinical program. However, Boggs averred that she taught at an "accredited facility" and for an "accredited clinical research program[]." When her averments are considered as a whole, she plainly stated that her teaching qualified because she taught in an accredited residency or clinical program. And, in the absence of evidence to contradict her averments at the time of the motion, the trial court clearly erred to the extent that it found that her institution was not properly accredited.

Legislature's statement that the professional may meet the time requirement by devoting the majority of his or her time to the instruction of students is not the same as stating that the professional must actually spend a majority of his or her time instructing students. We sincerely doubt that any instructor spends the majority of his or her professional time in the actual instruction of students. It is commonly understood that a person who teaches—and especially with regard to persons who teach a profession—must spend significant time preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process. Such activities are no less "devoted" to the "instruction of students" than the time actually spent in front of the students demonstrating a procedure or lecturing about the proper standards of care. As such, when it found that Boggs did not devote any portion of her professional time to the instruction of students, the trial court plainly relied on an erroneous understanding of MCL 600.2169(1)(b). As such, it necessarily abused its discretion. *Kidder*, 284 Mich App at 170.

IV. CONCLUSION

On the basis of Boggs's testimony and averments, we conclude that Boggs spent significantly more than 50 percent of her professional time in the active clinical practice of nursing or instructing nursing students.[5] Because Boggs met the professional-time qualification stated under MCL 600.2169(1)(b) as a matter of law, the trial court necessarily abused its discretion when it determined that she was not qualified under that statute. *Kidder*, 284 Mich App at 170. Moreover, because Boggs can testify regarding the standard of care, the trial court erred when it determined that it had to dismiss Gay's case because Gay would not be able to establish an essential element of her claim.

For these reasons, we reverse the trial court's judgment and order dismissing the suit, vacate its October 2010 order striking Boggs as a witness in its entirety, and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Gay may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald

[5] Boggs testified that she spent 50 percent of her time teaching and another 25 percent of her time in the active clinical practice of nursing. Thus, she met the more than "majority" professional-time requirement. See *Kiefer*, 283 Mich App at 558-559. We note that, even if one were to assume that Boggs only spent 35 percent of her time engaged in qualified teaching, when the 25 percent of her time that she testified that she spent engaged in the active clinical practice of nursing is added to that time, she still meets the professional-time requirement stated under MCL 600.2169(1)(b).